FILED
MAY 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27, Original

STATE OF OHIO.....Plaintiff

VS.

STATE OF KENTUCKY.....Defendant

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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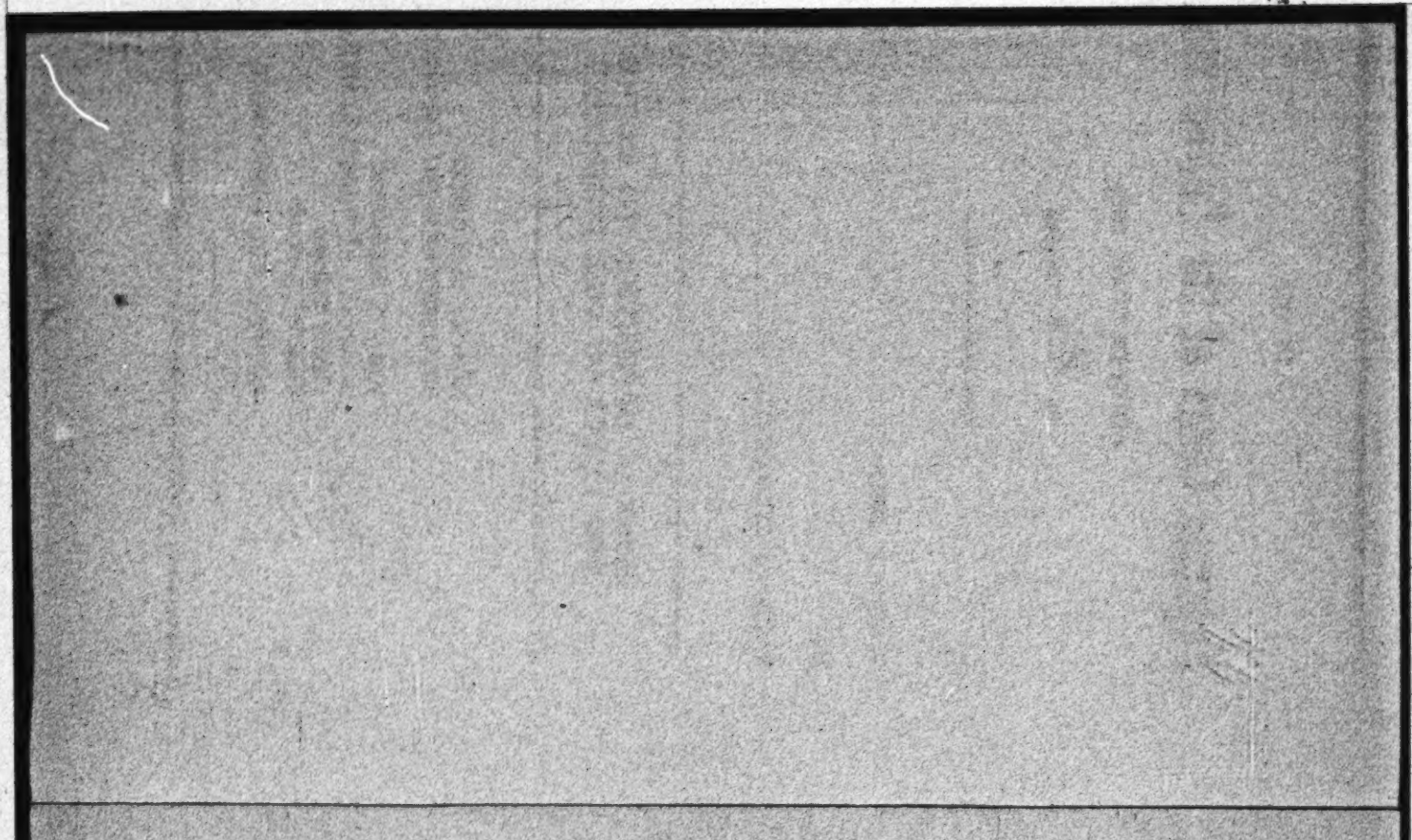

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STATE OF OHIO ..... *Plaintiff.*

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STATE OF KENTUCKY ..... *Defendant.*

STATEMENT

In the year 1784 the state of Virginia executed a deed of cession conveying to the Federal government all of its territory "situate, lying and being to the northwest of the River Ohio" upon the condition that it should be divided into three or more states to become part of the Federal union. The Ohio River was thus left in its original position as belonging to and owned by the state of Virginia. On December 18, 1789 the General Assembly of Virginia passed an act containing the terms and conditions upon which the district of Kentucky was erected into an independent state. The seventh clause of the compact between Virginia and Kentucky provided that the jurisdiction of Kentucky on the Ohio River "shall be concurrent only with the states which may possess the opposite shores of the said river." *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724 (1916). In admitting Kentucky to state-

hood, Congress adopted as its boundaries those of the district of Kentucky as they existed on December 18, 1789. 1 Stat. 189 (1791).

Kentucky officially became a state on June 1, 1792. On April 30, 1802 Congress carved out of the land ceded by Virginia to the Federal government the State of Ohio, the southern boundary of which was described by Congress as the Ohio River. 2 Stat. 173 (1802).

The Commonwealth of Kentucky claims that the boundary between it and the state of Ohio is the low-water mark on the present northern shore of the Ohio River. Kentucky does not claim that it has exclusive jurisdiction upon and over the entire Ohio River, and it has not repudiated the doctrine of concurrent jurisdiction. It is not true, as stated by plaintiff, that Kentucky does not recognize any rights of Ohio to ownership of territory north of the low-water mark on the northwest shore.

Kentucky has not enacted a "boundary statute" as indicated by plaintiff in the quotation on page 8 of its brief taken from comments of the Reviser appearing in "Notes and Annotations to the Kentucky Revised Statutes." The Reviser noted on page 3 of that volume that the line running along the northern or northwestern shore is the *low-water mark* on such shore.

Kentucky is attempting to exercise its jurisdiction on the Ohio River with regard to enforcement of its statutes requiring licenses of boats, and has for some time been enforcing on the river with respect to Ohio residents as well as Kentuckians its laws relating to fishing licenses and intoxicating beverages.

ARGUMENT I

KENTUCKY HAS OWNERSHIP AND SOVEREIGNTY OVER THE OHIO RIVER SOUTH OF THE LOW-WATER MARK ON THE NORTHERN SHORE.

The opinion of this Court by Chief Justice Marshall in *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820) established that the boundary between Kentucky and Indiana, and with the other states on the Ohio which were carved from the Northwest Territory ceded by Virginia, is the low-water mark on the northwest side of the river. In *Indiana v. Kentucky*, 136 U.S. 479 (1890) this Court held that the question of whether a certain tract of land should be considered a part of the state of Indiana or within Kentucky depended upon whether the land was separated from the mainland of Indiana by the waters of the Ohio River at the time that Kentucky became a state in 1792.

> "If when Kentucky became a State on the 1st of June, 1792, the water of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana."

The Kentucky Court of Appeals in *Perks v. McCracken*, 169 Ky. 590, 184 S.W. 891 (1916) applied the rule that the determination of whether a certain towhead or island sandbar in the Ohio River was located within the state of Illinois

or in Kentucky depended upon whether the island lay between the Kentucky shore and the low-water mark of the Ohio on its northwest side, as such mark existed when Kentucky became a state.

In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 613 (1899) this Court stated:

> "It must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River."

Recent opinions of the Kentucky Court of Appeals have affirmed that the state boundary is the low-water mark on the northern shore. Thus in *Shannon v. Streckfus Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939), in holding that Kentucky could tax excursion steamers on the Ohio, it was said:

> "The sovereign power and jurisdiction of this Commonwealth extends to and over the waters of the Ohio river to the low water mark on the northern side, except so far as Kentucky may have ceded or surrendered jurisdiction to the United States for national purposes."

In *Louisville Sand & Gravel Co. v. Ralston*, Ky., 266 S.W.2d 119 (1954) the Court referred to "the low water mark on the northern shore, the adjudicated northern boundary of Kentucky." And in *Commonwealth v. Henderson County*, Ky., 371 S.W.2d 37 (1963) it was stated:

> "The ownership of the Commonwealth of Kentucky in its sovereign capacity extends to the low water mark on the northern or northwestern side of the river."

The Commonwealth of Kentucky agrees with the state of Ohio that Kentucky's boundary along the Ohio River extends only to the low-water mark on the northwest shore. The case of *Indiana v. Kentucky*, 136 U.S. 479 (1890) seems to stand for the proposition that a dispute regarding a par-

ticular tract of land which appears to be a part of the northwest bank of the Ohio River must be resolved by reference to the low-water mark of the river as it was on June 1, 1792 when Kentucky became a state, if it can be ascertained, in order to determine if the tract was an island on that date. In the present case Ohio does not set up a claim to any island or particular tract of land and there is actually no dispute over specific territory which this Court is asked to resolve. Ohio contends generally that the "best available indication" of the 1792 north low-water mark is the survey made by the U. S. Army Corps of Engineers in the years 1896 to 1906. Yet the proposed complaint does not describe any territory now regarded by Kentucky as being within its boundary to which title is claimed by Ohio under a different version of the location of the low-water mark.

Kentucky contends that the charts made by the Army Corps of Engineers based on the surveys of 1896 to 1906 certainly do not establish the low-water mark of the river as it was on June 1, 1792 and, having been made more than a century after that date, do not constitute substantial or probative evidence of the location of the original low-water mark line. The difficulty of even establishing that the Ohio flowed north of a certain tract of land when Kentucky became a state is manifested in the opinion of Mr. Justice Field in *Indiana v. Kentucky*, 136 U.S. 379 (1890) in which reference is made to the unsatisfactory nature of the evidence of former transactions, ancient witnesses and geological speculations, and in fact the Court appears to have rested its decision chiefly upon acquiescence by Indiana in the exercise of jurisdiction by Kentucky over the land in question. That decision was rendered 76 years ago and there is no reason to believe that the location of the 1792 low-water mark has become more susceptible to accurate establishment since that time.

It is obvious that in view of the fact that it is impossible to specify with certainty where the 1792 low-water mark is situated today, the only practical and reasonable approach is to consider that Kentucky's boundary extends to the low-water mark on the present northern shore. This seems to be the statement of the boundary adopted in cases decided subsequent to *Indiana v. Kentucky*, 136 U.S. 479, and must necessarily prevail in the absence of a controversy involving a particular tract where convincing evidence of an earlier vintage than 1896 is presented to show that the low-water mark on the present shore is not the same as the 1792 mark.

A decisive factor in favor of Kentucky in this case is the fact that the state of Ohio has for a great many years acquiesced in the exercise of jurisdiction by Kentucky on the Ohio River up to the low-water mark on the present north shore, so far as concerns licensing and regulation of fishing and intoxicating beverages and generally for purposes of claiming that the river up to that point lies within and is owned by Kentucky. Now after a considerable period of acquiescence in Kentucky's administrative determinations that the low-water mark on the present shore should be considered the boundary, Ohio sees fit to ask for permission to file this complaint. This court noted in *Indiana v. Kentucky*, 136 U.S. 479 that although the evidence of geologists and recollections of witnesses was unconvincing, vague and imperfect, the fact that Indiana had not for a long period of time asserted any claim to the island in question, whereas Kentucky had exercised jurisdiction over it, was conclusive:

> ". . . It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised

> jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises?. . . For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.
>
> . . . The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it. . . ."

After lengthy acquiescence Ohio has no standing at this time to claim that the determination of Kentucky officials that the low-water mark on the present shore is the boundary is erroneous, and that the 1792 low-water mark is differently located in some places along the river.

ARGUMENT II

OHIO HAS CONCURRENT JURISDICTION WITH THE STATE OF KENTUCKY OVER THE OHIO RIVER, BUT THIS JURISDICTION IS NOT JOINT AND EQUAL AND DOES NOT PREVENT KENTUCKY LICENSING STATUTES FROM BEING ENFORCED ON THAT PART OF THE RIVER LYING WITHIN ITS TERRITORIAL LIMITS.

The provision in the Virginia Compact of 1789 that the jurisdiction of Kentucky on the Ohio river shall be concurrent with the states which possess the opposite shores of

the river is not denied by Kentucky. In *Wedding v. Meyler*, 192 U.S. 573 (1904) it was noted:

> "That the states opposite to Kentucky have the jurisdiction, whatever it is, *over* the Ohio river, which the Virginia compact provided for, was not disputed by the majority of the Kentucky court of appeals, and has been recognized by this court and elsewhere whenever the question has come up."

The Kentucky Court of Appeals stated in *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724, 727 (1916):

> "It should not be forgotten that 'concurrent jurisdiction' does not include the sovereignty or ownership of the river. That jurisdiction is conferred, not for the purpose of destroying the title of either sovereign, but to render more efficient the policing of the stream, and to prevent the loss and confusion which would result from defeating actions by pleas to the jurisdiction, when it might be difficult to determine precisely where the act occurred."

The exact nature and extent of the "concurrent jurisdiction" is difficult to resolve and depends upon the circumstances of each case. In *Wedding v. Meyler*, 192 U.S. 573 (1904) it was held that "concurrent jurisdiction" conferred authority on the courts of states north of the Ohio River to serve process at any place on the river. But it was expressly pointed out that concurrent jurisdiction is jurisdiction "on" the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.

The principle that "concurrent jurisdiction" of two states over a river between them does not extend to objects attached or anchored to the bed of the river was affirmed in *McGowan v. Columbia River Packers Assoc.*, 245 U.S. 352.

In *Nicoulin v. O'Brien*, 245 U.S. 113 (1918) this Court held that "concurrent jurisdiction" does not mean joint juris-

diction and Kentucky may enforce its statutes relating to fishing on the river even though the opposite state, in that case Indiana, had not consented to such enforcement or enacted legislation concurring in it.

> "The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. Indiana v. Kentucky, 136 U.S. 479, 519, 10 Sup. Ct. 1051, 34 L.Ed. 329. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia compact. . . ."

Miller v. McLaughlin, 281 U.S. 261 also holds that the grant of "concurrent jurisdiction" as to a river lying between two states does not deprive one state from legislating with respect to fishing and enforcing its statutes within its own territorial limits, even though the other state has not concurred in such legislation.

In *Nielsen v. Oregon*, 212 U.S. 315 it was held that there is a distinction between an act *malum in se* and one which is merely *malum prohibitum*, and where two states have "concurrent jurisdiction" over a river, the one first acquiring jurisdiction may prosecute and punish for any act which is *malum in se* and punishable by the laws of both states, and the judgment is a finality so that the person prosecuted cannot be tried again in either state. But one state having "concurrent jurisdiction" cannot prosecute a person for an act *malum prohibitum* by its own laws which was committed in territory located within the boundary of the other state and was done by authority of the latter. Applying that rule to the present case, the state of Ohio could not enforce its statutes requiring fishing or boating licenses upon the Ohio River south of the northern low-water mark against persons holding a Kentucky license, since the offense of operating without a license is *malum prohibitum*.

Kentucky has never denied the existence of concurrent jurisdiction with the state of Ohio on the Ohio River. The complaint proposed to be filed by Ohio does not allege that it has been denied the right to prosecute in its courts any offense malum in se committed upon any part of the river, or that its courts have been denied the right to serve process on the river. The only allegation to be found in the motion and briefs filed in this case is that Kentucky has denied the doctrine by attempting to require all Ohio residents owning and operating boats on the Ohio River to have Kentucky boating licenses, and by enforcing on the river its statutes requiring fishing licenses and statutes relating to intoxicating beverages. This action on the part of Kentucky is clearly authorized under the concept of "concurrent jurisdiction" by the holding in *Nicoulin v. O'Brien*, 248 U.S. 113, even though Ohio has not consented to such enforcement or concurred in the legislation.

CONCLUSION

The motion of the state of Ohio to be permitted to file its complaint against the state of Kentucky should not be granted for the reason that there is no dispute that the boundary of Kentucky extends to the low-water mark on the northwest shore of the Ohio River, and that the state of Ohio has concurrent jurisdiction with Kentucky on the river. Due to the obvious impossibility of determining precisely where the original 1792 low-water mark is currently located, the administrative determination of Kentucky officials that the low-water mark on the present shore should be considered to be the boundary is the only practical and reasonable approach. This determination should not be permitted to be attacked after long acquiescence by the state of Ohio, and particularly by evidence of a general nature relating to surveys made in 1896-1906 which cannot be said to establish the 1792 low-water mark or to constitute substantial or probative evidence of the location of such mark.

The decided cases indicate that Kentucky has never denied the existence of the concept of concurrent jurisdiction on the Ohio River, and there is no controversy presented by the complaint in this respect. It is not specified in what way Ohio may have been unlawfully denied the exercise of its proper jurisdiction on the river. All that is alleged is that Kentucky has enforced its licensing laws as to boating, fishing and intoxicating beverages on the river, and it is not

open to question that Kentucky can enforce such laws against anyone on the river south of the low-water mark on the northern shore, and may do so without the consent or concurrence of the state of Ohio since the river is admittedly within the territorial limits of Kentucky.

Respectfully submitted,

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May 25, 1966